

SPECIAL PROVISIONS

DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENTS

SELECTED DBE PROGRAM PROVISIONS

DISADVANTAGED BUSINESS PARTICIPATION IN USDOT ASSISTED CONTRACTS

OBJECTIVE:

The purpose of the DBE Program is to implement the provisions of 49 CFR Part 26, other pertinent regulations, and source legislation. The objectives are: (a) To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in the USDOT's highway, transit, and airport financial assistance programs; (b) To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts; (c) To ensure that USDOT's DBE program is narrowly tailored in accordance with applicable law; (d) To ensure that only firms that fully meet the eligibility standards specified in 49 CFR Part 26 are permitted to participate as DBEs; (e) To help remove barriers to the participation of DBEs in USDOT-assisted contracts; (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

AUTHORITY:

These Special Provisions are issued following guidelines found in 49 CFR Parts 23 (as amended) and 26, effective March 4, 1999, under authorities cited at 23 U.S.C. 324; 42 U.S.C. 2000d et seq.; 49 U.S.C. 1615, 47107, 47113, 47123; Executive Order 12138, 3 CFR, 1979 Comp. p. 393; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113; and in accordance with other directives contained in the VIDPW's Disadvantaged Business Enterprise Program.

POLICY:

It is the policy of the VIDPW to encourage and support the DBE Program and its objectives to the maximum extent possible. This rule shall be circulated throughout the VIDPW, Construction Organizations, DBE and non-DBE business communities that perform work with the VIDPW and other interested parties.

The VIDPW and all recipients of USDOT-assisted contracts shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The VIDPW and all recipients will further ensure that the VIDPW and/or all recipients of USDOT-assisted contracts shall not discriminate in the development, implementation and administration of the DBE Program. Implementation of the DBE Program by the VIDPW is a legal obligation and failure to carry out its terms shall be treated as a violation whereby sanctions may be imposed as provided for under Part 26.

No person shall be excluded from participation in or denied the benefits of, or otherwise discriminated against in connection with the award and performance of any contract covered by this DBE Program or 49 CFR Part 26 on the basis of race, color, sex or national origin.

In administering the DBE Program, the VIDPW shall not use criteria or methods that would have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex or national origin.

From time to time VIDPW shall receive interpretations from USDOT, which shall be binding on VIDPW, sub-recipients, and contractors.

DEFINITIONS:

COMMERCIALLY USEFUL FUNCTION (CUF) - means that a DBE is responsible for execution of a distinct element of the work of a contract or subcontract and carries out its responsibilities by actually performing, managing and supervising the work involved, or provides professional services.

COMPLIANCE – means that a recipient has correctly implemented the requirements of this part.

CONTRACT – means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

CONTRACT GOAL – means the percentage of DBE participation established by VIDPW, if required, for a USDOT- Assisted Contract.

CONTRACTOR – means one who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.

DEPARTMENT – means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

DESIGN CONSULTANT – means an individual, firm or partnership who contracts with the VIDPW to provide services for engineering, surveying, environmental, hazardous materials, subsurface utility engineering, and other services, which require a rigorous, logical, science, based approach for data acquisition to be used in the development of VIDPW highway construction plans.

DISADVANTAGED BUSINESS ENTERPRISE OR DBE – means a for-profit small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it.

GOOD FAITH EFFORTS – means efforts to achieve a DBE goal or other requirement of the DBE Program, which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirements.

JOINT VENTURE – means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

NAICS – North American Industrial Classification System – replaces the Standard Industrial Classification (SIC) code designation, which best describes the primary business of a firm.

NONCOMPLIANCE – means that a recipient has not correctly implemented the requirements of 49 CFR Part 26.

CRO – means Civil Rights Office of the VIDPW.

OPERATING ADMINISTRATION (OA) – means any of the following parts of USDOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA). The "Administrator" of any OA includes his or her designees.

DEFINITIONS (cont.):

OVER-CONCENTRATION – means a condition in which DBE firms are being utilized in certain types of work to the extent that non-DBEs are unduly burdened from participating in this same type of work.

PRIMARY INDUSTRY CLASSIFICATION – means the four-digit Standard Industrial Classification (SIC) Code designation that best describes the primary business of a firm. The SIC code designations are described in the standard Industry Classification Manual.

PRIMARY RECIPIENT – means a recipient to which USDOT financial assistance is given and passes some or all of it on to another recipient.

PROGRAM – means any undertaking on a recipient's part to use USDOT financial assistance, authorized by the laws to which this part applies.

RACE-CONSCIOUS MEASURE – means a program that is focused specifically on assisting only DBEs, including women-owned DBEs.

RACE-NEUTRAL MEASURE – means a program that is, or can be, used to assist all small businesses. For purposes of this part, race-neutral includes gender-neutrality.

READY, WILLING AND ABLE – means, for the purpose of setting annual DBE goals, in the context of a DBE or non-DBE business, that it has the necessary license to perform work on USDOT-assisted contracts in its home state, is not currently suspended or debarred, and has demonstrated its interest in performing work on USDOT-assisted contracts by submitting a bid, proposal, or quotation as a prospective prime contractor, subcontractor, supplier, trucker, consultant, or other relevant business entity, on a Virgin Islands USDOT-assisted contract within the current or two (2) previous federal fiscal years, or such shorter duration as established by the Department.

RECIPIENT – means any entity, public or private, to which USDOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA or FTA or who has applied for such assistance.

SECRETARY – means the Secretary of the U. S. Department of Transportation or his/her designee.

REGULAR DEALER - means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturer's representatives, or other persons who arrange or expedite transactions are not regular dealers.

SMALL BUSINESS ADMINISTRATION (SBA) – means the United States Small Business Administration.

SMALL BUSINESS CONCERN – means with respect to firms seeking to participate as DBEs in USDOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act

and Small Business Administration Regulations implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in 26.65(b).

SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL – means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is –

Any individual whom the VIDPW finds to be socially and economically disadvantaged pursuant to its DBE certification procedure.

Any individual in the following groups, members of which are rebuttable presumed to be socially and economically disadvantaged:

- (a) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
- (b) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- (c) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- (d) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- (e) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives islands, Nepal or Sri Lanka;
- (f) Women; and
- (g) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

STATE GOAL – means the VIDPW's determination, calculated annually as a percentage, of the level of DBE participation on Virgin Islands USDOT-Assisted Contracts, VIDPW expects absent the effects of discrimination.

USDOT-ASSISTED CONTRACT – means any contract between a recipient and a contractor (at any tier) funded in whole or in part with USDOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

VIDPW – means the Virgin Islands Department Public Works.

Pre-Bid and Demonstration of Good Faith Efforts (GFE's):

When the VIDPW has established a DBE contract goal on a USDOT-assisted individual project, it shall award the contract only to a bidder who meets the established goal or who makes good faith efforts to do so. The award of the contract will be conditioned on meeting the requirements of this section. The VIDPW shall determine whether a bidder has made good faith efforts if it documents either: that it can

meet the DBE contract goal by documenting that it has obtained commitments for sufficient participation by DBE firms; or by documenting that it made adequate good faith efforts to meet the DBE contract goal by showing that it took all necessary and reasonable steps, which by their scope, intensity, and appropriateness to the objective of meeting the goal, could reasonably be expected to obtain sufficient DBE participation, even if the bidder was not fully successful.

1. All bidders shall give written assurance in their bid proposal to meet the established DBE contract goal or propose a reduced goal. The bidder's written assurance will be considered binding. Failure to make and/or abide by such written assurance shall render a bid non-responsive.
2. All bidders must complete and sign the DBE Commitment Form A-585 (Appendix A) and the Bidders List of Quote's Form BL-DBE (Appendix B) and include them with the other required documents of the bidder's "Proposal Package" submitted at the time of the Bid Opening. If the contract involves the use of consultants then the bidder must complete the Offeror's List (Appendix C) and the Certification of Consultant or Offeror for DBE Annual State Goal forms (Appendix D) and submit them with the "Proposal Package". All listed DBE firm(s) must be certified by the DPW prior to submission of the DBE Commitment Form.
3. The information required on all forms must be accurate, complete in every detail and in final form at the time; it is submitted to the VIDPW and/or its Contracting Office (Department of Property & Procurement) at the Bid Opening. Failure to submit these forms in proper form and accuracy at the Bid Opening shall render the bid non-responsive. All bidders are required to list on the DBE Commitment Form A-585, the following information:
 - a. The names of the DBE subcontractor(s) and/or material supplier(s) that will participate in the contract;
 - b. Item number(s) & description of the work that the DBE will perform;
 - c. The dollar amount of the participation for each item of work the DBE will perform;
 - d. Written documentation of the bidder's commitment to use a DBE subcontractor/supplier whose participation it submits to meet the DBE contract goal.
4. If the apparent low bidder cannot meet the established DBE contract goal, and proposes a reduced DBE goal, the bidder shall document and submit its justification for not meeting the goal and its documented demonstration of good faith efforts at the time of the bid opening. This justification is a documented demonstration of good faith efforts by the bidder, which must, in the end, show that the contractor had actively and aggressively sought out DBEs to participate in the project. Mere *pro forma* efforts are not the necessary and reasonable steps that indicate good faith efforts. The VIDPW will consider the quality, quantity, and intensity of the different kinds of efforts that were made in trying to obtain DBE participation sufficient to meet the DBE contract goal. The following is a list of types of actions, which the VIDPW will consider as part of the bidder's good faith efforts to obtain DBE participation. This list is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive, as other factors or types of efforts may be relevant in appropriate cases. This demonstration should include, but not be limited to, the following:
 - a. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow DBEs to respond to the solicitation. The bidder must determine with certainty if taking appropriate steps to follow up initial solicitations interests the DBEs.
 - b. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

- c. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- d. Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration.

However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. In addition, the ability or desire of the prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

- e. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor is standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
 - f. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
 - g. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
 - h. Effectively using the services of available minority/women community organizations; minority/women contractor's groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
5. In determining whether a bidder has made good faith efforts, the VIDPW may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, the VIDPW may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, the VIDPW may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.
6. The good faith efforts documentation required to justify the proposed goal shall be based on efforts made by the prime contractor from the date of Invitation For Bids to the date of the bid opening. The VIDPW will not consider any effort made by the prime contractor after bid opening.
7. Examples of actions which may not be acceptable as reasons for failure to meet the DBE goal:
- a. DBE unable to provide performance and/or payment bonds.
 - b. Rejection of reasonable DBE bid based solely on price.
 - c. DBE would not agree to perform all or most of the work of the contract.
 - d. Union versus non-union status.
 - e. Prime contractor normally would perform all or most of the work of the contract.

- f. Solicitation by mail or telephone only.
8. If the bidder is able to demonstrate good faith efforts, the VIDPW may award the contract at the bidder's proposed DBE contract goal.

Pre-Bid and Demonstration of Good Faith Efforts (cont.)

9. If the VIDPW determines that the bidder is unable to demonstrate good faith efforts, the VIDPW will not award the contract, but shall provide to the bidder the opportunity for administrative reconsideration. As part of this reconsideration, the following guidelines apply:
- a. The bidder shall have the opportunity to provide written documentation or argument concerning the issue of whether the bidder met the DBE contract goal or made adequate good faith efforts to do so.
 - b. The VIDPW's decision on reconsideration shall be made by an official who did not take part in the original determination that the bidder failed to meet the DBE contract goal or make adequate good faith efforts to do so.
 - c. The bidder shall have the opportunity to meet in person with the VIDPW's reconsideration official to discuss the issue of whether it met the DBE contract goal or made adequate good faith efforts to do so.
 - d. The VIDPW shall send a written decision on the reconsideration, explaining the basis for finding that the bidder did or did not meet the DBE contract goal or make adequate good faith efforts to do so.
 - e. If the reconsideration decision finds that the bidder did meet the DBE contract goal or did make adequate good faith efforts to do so, the VIDPW may award the contract at the bidder's proposed DBE contract goal.
 - f. If the reconsideration decision finds that bidder did not meet the DBE contract goal or did not make adequate good faith efforts to do so, the VIDPW will not award the contract to that bidder, but will notify the next lowest responsible bidder that its bid proposal, with all required documentation therein, is being considered for award of contract.
 - g. The result of this reconsideration process is not administratively appeal able to the USDOT.
10. The DBE contract goal committed by the successful bidder will become the established DBE contract goal for the project as a contract requirement. If, at the completion of the project, the prime contractor fails to meet its commitment, it will be required to document and justify why it failed to meet this commitment. The Liquidated Damage Provision as stated below will apply if the contractor fails to demonstrate good faith efforts to meet the committed goal.
11. If the VIDPW lets for bid a "design-build" or "turnkey" contract, in which the VIDPW lets a master contract, or similar legally binding instrument, to a contractor, who in turn lets subsequent subcontracts for the work of the project, the VIDPW may establish a DBE contract goal for the project. The master contractor then establishes DBE contract goals, as appropriate, for the subcontracts it lets. The VIDPW shall maintain oversight of the master's contractor's activities to ensure that they are conducted consistent with the requirements of these Special Provisions, the VIDPW's DBE Program and 49 CFR Parts 23 (as amended) and 26.
12. The VIDPW requires that the successful bidder, or subsequently the prime contractor, not terminate for convenience a DBE subcontractor listed in DBE Commitment Form, or an approved substitute DBE firm, and then propose to perform the work of the terminated subcontract with its own forces or those of an affiliate, without the VIDPW's prior written consent. See the Termination / Substitution / Replacement of Listed DBE Firms provision below.

Pre-Bid and Demonstration of Good Faith Efforts (cont.)

COUNTING DBE PARTICIPATION:

1. When a DBE participates in a contract, only the value of the work actually performed by the DBE will be counted.
 - a. The entire amount of that portion of a construction contract or other contract that is performed by the DBE's own forces will be credited. Included are the costs of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - b. Credit will be allowed for the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract. Credit will be allowed for fees considered reasonable and not excessive as compared with fees customarily allowed for similar services.
 - c. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE's subcontractor is itself a certified DBE. Work that a DBE subcontracts to a non-DBE firm does not count.
2. When a DBE performs as a participant in a joint venture, credit for a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces will be allowed.
3. Credit to a DBE contractor will be allowed only if the DBE is performing a commercially useful function on the contract.
 - a. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, an evaluation will be made of the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing, and the DBE credit claimed for its performance of the work and other relevant factors.
 - b. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, an examination of similar transactions, particularly those in which DBEs do not participate, will be performed.
 - c. If a DBE does not perform or exercise responsibility for at least the percentage determined in the VIDPW Standard Specifications for Highway and Bridge Construction of the total cost of its contract with its own forces, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that the DBE is not performing a commercially useful function.
 - d. When a DBE is presumed not to be performing a commercially useful function as provided above, the DBE may present evidence to rebut this presumption. It may be determined that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

- e. Decisions concerning commercially useful function matters are not administratively appeal able to USDOT.

COUNTING DBE PARTICIPATION (cont).

- 4. The following factors will be used to determine whether a DBE trucking firm is performing a commercially useful function. The VIDPW shall evaluate the amount of work subcontracted, industry practices and other relevant factors:
 - a. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purposes of counting DBE participation.
 - b. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - c. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - d. The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
 - e. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
 - f. A lease arrangement or agreement shall indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks shall display the name and identification number of the DBE.
 - g. Prior to beginning work on a contract, the DBE must submit valid lease agreements to the VIDPW on all leased trucks and written agreements with owner/operators. Whether the agreement is with an owner/operator or trucks hired from a trucking firm, the agreement must include the:
 - 1. Operator's Name;
 - 2. Social Security number;
 - 3. Federal Identification Number (FIN);
 - 4. Cab Card Number of the Truck;
 - 5. Description of the Truck and the Method of Payment.
- 5. The following factors are used in determining whether a DBE truck owner/operator will be credited:
 - a. An Owner/Operator must own one (1) fully operational truck and operate it himself/herself for hire. The individual must possess a Commercial Driver's License and the truck must have a current registration and be properly licensed. If required, the firm must have the appropriate operating license and insurance. The individual must be an independent owner/operator and cannot be in an employee/employer relationship with a prime contractor.
 - b. Owner/Operator trucks may be utilized by the prime contractor to meet a DBE goal and must be covered by a fully executed written agreement.

- c. For each owner/operator to be credited, the contractor or subcontractor must submit to the VIDPW, a valid agreement that includes or has attached the following information:
 1. Owner/operator's name;
 2. Social Security Number;
 3. Copy of Vehicle registration receipt;
 4. Current Vehicle license number;
 5. Truck Number;
 6. Method of payment (hour, ton, load).
 - 7.

COUNTING DBE PARTICIPATION (cont).

- d. The prime contractor may count towards its DBE participation, the total dollar value paid to an owner/operator for the haul. Payments to owner/operators must be certified to by the prime contractor prior to finalizing the project or as work progresses, as required by the VIDPW. If required, the owner must be shown on the prime contractor's certified payroll.
6. Expenditures with DBEs for Materials or Supplies:
 - a. If the materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost of the materials or supplies may be counted. For the purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
 - b. If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies may be counted.
 - c. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, only the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on the job site, provided the VIDPW determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. *No portion of the cost of the materials or supplies themselves may be counted toward DBE contract goals.*
 7. All listed DBE firms must be certified by the VIDPW prior to the prime contractor's submission of the DBE Commitment Form A-585. If a firm is not currently certified as a DBE in accordance with approved certification standards at the time of the execution of the contract, the VIDPW may not count the firm's participation toward any DBE goals, except as provided for by the following, in regards the effects of removal of eligibility by the VIDPW:
 - a. When a prime contractor has made a commitment to using the ineligible firm or the VIDPW has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the issue of a de-certification notice, the ineligible firm will not count toward the contract goal or overall goal. The VIDPW shall direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate that it has made good faith efforts to do so.
 - b. If a prime contractor has executed a subcontract with the firm before the VIDPW has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit towards its DBE goal for the firm's work. In this case, or in a case where the VIDPW has let a prime contractor to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the VIDPW has issued the notice of its ineligibility shall not count toward the VIDPW's overall goal, but may count toward the contract goal.

- c. Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during its performance of the contract, the VIDPW may continue to count its participation on that contract toward overall and contract goals.
- 8. The VIDPW may not count the dollar value of work performed under a contract with a firm, after it has ceased to be certified, toward the overall goal.
- 9. The VIDPW may not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the overall goal until the amount being counted toward the goal has been paid to the DBE.
- 10. Over concentration shall be presumed to exist in a type of work, other than trucking work, when either of the following conditions have been met:

COUNTING DBE PARTICIPATION (cont).

- a. More than 50% of the total number of firms ready, willing and able to perform such work are comprised of DBE firms, or
- b. DBE firms earned more than 50% of the total Federal-aid dollars spent on such work during the previous federal fiscal year.

Over concentration shall be presumed to exist in trucking work when both the following conditions have been met:

- a. More than 80% of the total number of firms ready, willing and able to perform such work are comprised of DBE firms and,
- b. More than 80% of the total Federal-aid dollars spent on such work during the previous federal fiscal year was earned by DBE firms.

In the event a presumption of overconcentration arises pursuant to the aforementioned sections, VIDPW shall make further investigation to determine if the presumption of overconcentration in a type of work is rebutted by a review of the totality of the circumstances. Such review shall consider whether a false presumption of overconcentration is resulting from extraneous influences such as the geographic location of the work versus the geographic location of the DBE and non-DBE firms involved, the number and size of contracts giving rise to the appearance of overconcentration, and any other relevant factors affecting DBE or non-DBE participation in the type of work.

If overconcentration in a type of work is deemed by VIDPW to exist, measures to address the overconcentration will be devised. These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs and other appropriate measures designated to assist DBE's in performing work outside of the specific field in which it has been determined that non-DBEs are unduly burdened.

The VIDPW shall annually determine and document whether DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in that type of work.

No credit for the use of DBEs in the type of work for which overconcentration is determined by VIDPW to exist shall be given in the event a race-conscious DBE goal has been placed on a project. If VIDPW determines such reduced credit is required for a type of work on a project, VIDPW shall so notify prospective bidders in the Invitation For Bids.

TERMINATION / SUBSTITUTION / REPLACEMENT OF LISTED DBE FIRMS:

1. The VIDPW requires that the prime contractor not terminate for convenience a DBE subcontractor listed in the DBE Commitment Form A-585, or an approved substitute DBE firm, and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the VIDPW's prior written consent.
2. If a DBE subcontractor is terminated, or the DBE firm fails to complete its work on the contract for any reason, the VIDPW requires the prime contractor to make good faith efforts to find another certified DBE subcontractor to substitute for the original DBE firm. These good faith efforts shall be documented and directed at finding another certified DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to count DBE participation.
3. If a DBE subcontractor is unwilling or unable to perform the work of the commitment made to the prime contractor, the prime contractor shall immediately notify in writing the VIDPW's project manager, and request to be relieved of the commitment to use the named DBE. The prime contractor shall include with this request a justification and the good faith efforts made in dealing with the named DBE.
4. If the prime contractor's request to be relieved is approved by the VIDPW, and a DBE contract goal shortfall exists, the prime contractor shall immediately attempt to obtain sufficient DBE participation by subcontracting with other certified DBEs.
5. If the prime contractor is unable to replace the committed DBE with another or other certified DBE firms, the prime contractor shall evaluate the remaining items of work and shall document and submit the good faith efforts made to subcontract work with certified DBEs or to purchase materials or supplies from certified DBE suppliers for such remaining items. The VIDPW may allow a DBE contract goal waiver, adjust the DBE goal accordingly as to submitted and accepted good faith efforts, or assess liquidated damages as may be appropriate, depending on the individual project's overall circumstances.

PROMPT PAYMENT MECHANISMS TO SUBCONTRACTORS:

To ensure that all obligations under contracts awarded to DBEs are met, the VIDPW will review the contractor's DBE involvement efforts during the performance of the contract. Prime contractors shall pay all subcontractors their respective subcontract amount by electronic transfer, if available, for VIDPW accepted work within ten (10) calendar days after the contractor receives payment for such work from the VIDPW. The contractor will be required to submit information as requested regarding all payments made to DBEs and non-DBEs within ten (10) calendar days after the contractor receives payment for such work. A prime contractor shall be required to fully document any alleged disputes with its subcontractors. The contractor shall ensure that all situations in which regularly scheduled payments are not made to subcontractors are reported to the VIDPW. If the prime contractor is found to be in violation or fails to abide by the prompt payment mechanisms, the VIDPW shall impose sanctions as stated under Penalties for Failure to Meet Overall Goals. The contractor shall further be required to release retainage payments to the subcontractors within thirty (30) calendar days of satisfactory completion of the entire subcontractor's work and final payment of such work by the VIDPW.

RACE-CONSCIOUS MEASURES PROGRAM FOR LIQUIDATED DAMAGES:

The VIDPW shall impose, where appropriate, liquidated damages provision regarding the VIDPW's DBE Program.

If at the completion of the project, the prime contractor has failed to meet the established or reduced DBE goal, or has not demonstrated good faith efforts and/or has not obtained a DBE contract goal waiver, the

prime contractor shall be assessed liquidated damages for the difference between the established or reduced DBE goal and the actual DBE participation achieved.

RECORD KEEPING REQUIREMENTS AND THE MONTHLY PRIME CONTRACTOR OR PRIME CONSULTANT PAYMENT INFORMATION FORM A-644 (Appendix E):

1. The prime contractor shall keep such records as necessary to ensure compliance with its DBE utilization obligations.
2. As requested, the prime contractor will submit all subcontracts and other financial transaction documentation executed with DBEs in such form, manner and content as prescribed by the VIDPW.
3. The prime contractor must retain all such records for at least three (3) years after project acceptance by the FHWA following the completion of the contract. These records shall be available for inspection by the VIDPW, the FHWA, the USDOT or other appropriately sanctioned Virgin Islands State Agencies or Federal Agencies or Departments.
4. The prime contractor's DBE liaison officer or designee shall complete the top half of Form A-644, Monthly Contractor DBE Participation, whether paid by the prime contractor or one of its subcontractors, and submit the form or its facsimile to the VIDPW's project manager or designee at the monthly estimate cutoff date.
5. The VIDPW will conduct, at a minimum, an annual audit on selected construction projects to verify actual participation reported on Form A-644 Monthly Contractor DBE Participation.

COMPLIANCE PROCEDURES:

Whenever the VIDPW believes the recipient or the contractor or any subcontractor or supplier on a USDOT-assisted contract may not be operating in compliance with the terms, conditions or requirements of this DBE Program, including but not limited to, encouraging fronting, brokering or the circumstance of a DBE not performing a commercially useful function as defined, the VIDPW will conduct an investigation. If it is found that the recipient or the contractor or any subcontractor or supplier is not in compliance with the DBE Program or these Special Provisions, the non-compliant party will be notified in writing by the VIDPW. A compliance conference to discuss the area(s) of non-compliance may be held between the VIDPW and the non-compliant party or parties. In the event that the non-compliant party or parties fails or refuses to perform in compliance with the DBE Program or these Special Provisions, a "Notice of Non-Compliance" will be transmitted. If the non-compliant party or parties corrects the deficiencies, the "Notice of Non-Compliance" will be rescinded and the party or parties will be notified as to compliance. If the deficiencies are not corrected, the VIDPW will initiate administrative action against the non-compliant party or parties, which may include but not be limited to:

1. Termination of the contract.
2. Withholding an appropriate percentage of partial payments. This appropriate percentage may be the amount of any proposed monetary sanction.
3. Initiation of appropriate debarment or de-certification proceedings.
4. Referral of any unlawful actions to the appropriate enforcement agencies.
5. Other actions as appropriate, at the discretion of the VIDPW.

Updated 10/05